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Unum Life Insurance Company of America
7

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10

11 GAYLE MAHONEY,

12 Plaintiff,

13 vs.

14 UNUM GROUP, UNUM LIFE
INSURANCE COMPANY OF AMERICA,
15 THE COMMISSIONER OF THE
CALIFORNIA DEPARTMENT OF
16 INSURANCE and DOES 1-20,
INCLUSIVE,

17 Defendants.
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Case No. 3:15-cv-03532

NOTICE OF REMOVAL

[28 U.S.C. 1332, 1441(b), 1446]

[Filed Concurrently With:

- Civil Cover Sheet;
- Declaration of Susan Griffin;
- Declaration of James A. Hazlehurst; and
- Request for Judicial Notice]

State Action Filed: August 6, 2014

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE THAT Defendants Unum Life Insurance Company of America (“Unum Life”) and Unum Group (collectively, “Removing Defendants”) hereby remove to this Court the action commenced on August 6, 2014 in the Superior Court of the State of California, County of San Francisco, entitled *Gayle Mahoney v. Unum Group, et al.*, Case No. CGC-14-540980. Removal of this action is proper for the following reasons:

TIMELINESS OF REMOVAL

1. Service of process was completed on the Removing Defendants in this action on July 2, 2015. True and correct copies of the documents reflecting such service are attached collectively hereto as Exhibit “A.” Removing Defendants are informed and believe that Exhibit “A” constitutes all process, pleadings and orders filed in the State Court Action.

2. This removal is timely under 28 U.S.C. § 1446(b) in that removal is sought within 30 days after service of the summons and complaint on Removing Defendants.

DIVERSITY OF CITIZENSHIP

3. The action is a civil action of which this Court has jurisdiction under the provisions of 28 U.S.C. § 1332, and is one which may be removed to this Court by Removing Defendants pursuant to the provisions of 28 U.S.C. § 1441(b), in that it is a civil action between citizens of different states and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, as set forth more fully below.

4. Plaintiff Gayle Mahoney (“Plaintiff”) is, and at all times relevant was, a resident and a citizen of the State of California. Complaint, p. 1, ¶ 1.

5. Defendant Unum Group is, and at all relevant times was, a general business corporation organized under the laws of the State of Delaware, with its principal place of business located in Chattanooga, Tennessee. Unum Group is a

1 non-insurance holding company for all of its subsidiary companies, including
 2 Defendant Unum Life, which is a corporation with its principle place of business
 3 located in the state of Maine.

4 6. As explained in detail below, Removing Defendants allege that
 5 Defendant The Commissioner of the California Department of Insurance
 6 (“Commissioner”) is a “sham” defendant fraudulently joined in this action whose
 7 residence is to be disregarded for removal purposes. *United Computer Sys. v. AT&T*
 8 *Corp.*, 298 F.3d 756, 761 (9th Cir. 2002).

9 JURISDICTIONAL AMOUNT

10 7. This case involves a dispute between Plaintiff and Unum Life
 11 concerning Plaintiff’s claim for long term disability benefits under a group disability
 12 insurance policy, policy no. 359895 (the “Policy”). The Complaint alleges that the
 13 Policy promises to pay Plaintiff disability benefits equal to 66.6667% of her pre-
 14 disability earnings, until she reaches age 65, in the event she becomes disabled
 15 under the Policy's terms. Complaint, p. 9, ¶¶ 47-49.

16 8. Plaintiff alleges that after initially approving her claim and granting her
 17 benefits in October 2010 (Complaint, p. 11, ¶67), Unum Life then denied her claim
 18 and discontinued its payment of benefits on August 22, 2011 (Complaint, p.11, ¶
 19 68), and in doing so breached the Policy, breached the duty of good faith and fair
 20 dealing and caused Plaintiff severe emotional distress. Complaint, p.11, ¶ 73; p. 13,
 21 ¶ 80; p. 15, ¶ 94.

22 9. If Plaintiff is successful in establishing her entitlement to benefits
 23 beyond August 22, 2011, the base disability benefit payable under the terms of the
 24 Policy would be \$3,078.30 per month. *See* the concurrently filed Declaration of
 25 James Hazlehurst, ¶ 2, and Exhibit “1” thereto.

26 10. Plaintiff alleges that she continues to be disabled, and that Unum Life
 27 has upheld its decision to discontinue benefit payments allegedly due her under the
 28 policy since August 22, 2011. Complaint, p. 11, ¶¶ 68-73. As noted above, the

1 Policy provides for disability benefits of \$3,078.30 per month, or \$36,939.60 per
 2 year (\$3,078.30 x 12).

3 11. At \$3,078.30 per month, **the allegedly “past due” disability benefits**
 4 **at issue as of the date of removal amount to \$144,680.10** (\$3,078.30 x 47 months
 5 since August 22, 2011), not including interest. Accordingly, the purportedly “past
 6 due” benefits at issue alone would easily satisfy the jurisdictional minimum.

7 12. Plaintiff’s first claim for relief is for breach of the implied covenant of
 8 good faith and fair dealing (*i.e.*, “bad faith”). A plaintiff who prevails on a bad faith
 9 claim arising from the denial of benefits under a disability insurance policy may
 10 recover as damages not only past due benefits, but also those future policy benefits
 11 that the jury reasonably concludes “the policyholder would have been entitled to
 12 receive had the contract been honored by the insurer.” *Egan v. Mutual of Omaha*
 13 *Ins. Co.*, 24 Cal. 3d 809, 824 (1979); *see also Albino v. Paul Revere Insurance*
 14 *Company*, 349 F. Supp. 2d 1334, 1339-1340 (C.D. Cal. 2004) (including the present
 15 value of potential future disability payments when a bad faith claim for relief is
 16 pled); *Flores v. Paul Revere Insurance Company*, 2010 U.S. Dist. LEXIS 7654 at
 17 *12 (D. Nev. 2010) (“Because the court may consider compensatory damages when
 18 determining the amount in controversy [citation], the court will include the
 19 \$38,029.99 in future benefits in the amount-in-controversy calculation”). Here,
 20 Plaintiff alleges that Unum Life promised to pay her benefits under the Policy to age
 21 65 (Complaint, p. 9, ¶ 49) and, as noted, the maximum future policy benefits
 22 allegedly owed to Plaintiff amount to \$36,939.60 per year. Plaintiff is currently 56
 23 years old, and will reach age 65 in September 2023 - - 109 months from the date of
 24 removal. Thus, if Plaintiff prevails on her bad faith claim and demonstrates
 25 entitlement to future benefits under the Policy through September 2023, **the**
 26 **maximum potential future benefits (\$3,078.30 x 109 mos. = \$335,534.70) would**
 27 **also significantly exceed the amount in controversy threshold.**

13. Plaintiff additionally claims mental and emotional distress for which she seeks an unspecified sum of damages against Removing Defendants. Complaint, p. 16, ¶ 97; p. 19, ¶ 120. Emotional distress damages are recoverable as damages in a first party insurance bad faith action. *See, e.g., Jordan v. Allstate Ins. Co.*, 148 Cal. App. 4th 1062, 1079 (2007). Plaintiff also seeks an unspecified sum of exemplary and punitive damages against Removing Defendants. Complaint, p. 14, ¶ 86; p. 16, ¶ 99; p. 19, ¶ 122. Punitive damages can also be considered in the amount-in-controversy calculation. *See Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001) (citing *Bell v. Preferred Life Assur. Soc'y*, 320 U.S. 238, 240 (1943) (“[i]t is well established that punitive damages are part of the amount in controversy in a civil action”). Lastly, Plaintiff also seeks to recover attorneys’ fees. Complaint, p. 14, ¶ 84; p. 19, ¶ 124. Such damages are also potentially recoverable (*see Brandt v. Superior Court*, 37 Cal. 3d 813, 817 (1985)), and thus should be included as part of the amount in controversy. *See Campbell v. Hartford Life Ins. Co.*, 2011 U.S. Dist. LEXIS 106582, *9 (E.D. Cal. 2011) (“Because attorney’s fees attributable to the prosecution of Plaintiff’s breach of contract cause of action are recoverable via her Bad Faith claim, such fees may therefore be included in determining the amount in controversy.”). Therefore, when accounting for all of the above-referenced damages, the amount in controversy in this case significantly exceeds the jurisdictional amount. *See Richmond v. Allstate Ins. Co.*, 897 F. Supp. 447, 449-450 (S.D. Cal. 1995) (emotional distress damages, punitive damages, and attorneys’ fees are to be considered in calculating the amount in controversy).

**THE COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF
INSURANCE IS A SHAM DEFENDANT**

14. Plaintiff’s fourth cause of action alleges that Removing Defendants entered into a California Settlement Agreement (“CSA”) with the Commissioner under which they agreed to make certain changes to their claims handling procedures. Complaint, p. 17, ¶ 107; p. 18, ¶ 111. Plaintiff further alleges that,

1 under the CSA, the Commissioner has a mandatory duty to monitor Removing
 2 Defendants' compliance with the terms of the CSA. Complaint, pp. 117-18, ¶ 109.
 3 Plaintiff contends that the Commissioner has breached that obligation by failing "to
 4 timely and comprehensively examine the Insurer Defendant's compliance with the
 5 CSA." Complaint, p. 18, ¶ 114. Plaintiff seeks a writ to compel the Commissioner
 6 to "perform the duties imposed by law" to monitor Removing Defendants'
 7 compliance with the CSA. Complaint, p. 19, ¶ 118.

8 15. Removing Defendants contend that the Commissioner is a "sham"
 9 defendant who was fraudulently joined by Plaintiff for the sole purpose of defeating
 10 the diversity jurisdiction of this Court, and that removal is proper because no cause
 11 of action can be maintained by Plaintiff against the Commissioner for two primary
 12 reasons: (1) Because Plaintiff is attempting to compel the Commissioner to exercise
 13 *discretionary power* in a particular manner, but mandamus does not lie to compel
 14 the Commissioner to perform a discretionary act; and (2) because the Commissioner
 15 has in fact performed the task (monitoring compliance with the CSA) that Plaintiff
 16 seeks to compel. Under these circumstances, no cause of action for writ of mandate
 17 lies.

18 *Removal is proper where a non-diverse defendant is fraudulently joined*

19 16. Under Federal law, a defendant may remove a case naming a non-
 20 diverse defendant on the basis of diversity jurisdiction, if the resident defendant was
 21 fraudulently joined. *Zogbi v. Federated Dep't Store*, 767 F. Supp. 1037, 1041 (C.D.
 22 Cal. 1991). "[I]f a plaintiff fails to state a cause of action against a resident
 23 defendant, and the failure is obvious according to the settled rules of the state, the
 24 joinder of the resident defendant is fraudulent." *McCabe v. Gen. Foods Corp.*, 811
 25 F.2d 1336, 1339 (9th Cir. 1987). The defendant seeking removal is entitled to
 26 present facts showing that the joinder is fraudulent. *Id.* In *Lewis v. Time, Inc.*, 83
 27 F.R.D. 455, 460 (E.D. Cal. 1979), the court explained: "In other words, a joinder is
 28 fraudulent if 'there [is] no real intention to get a joint judgment and ... there [is] no

1 colorable ground for so claiming.’... The court may ‘pierce the pleadings, consider
2 the entire record, and determine the basis of joinder by any means available.’”

3 Plaintiff’s attempt to compel the Commissioner to exercise discretionary
4 power in a particular manner is improper

5 17. Even if Plaintiff’s allegations against the Commissioner were made in
6 good faith, diversity jurisdiction is not destroyed because Plaintiff’s petition for a
7 writ of mandamus fails as a matter of law. Under California law, “[m]andamus does
8 not lie to compel a public agency to exercise discretionary powers in a particular
9 manner, only to compel it to exercise its discretion in some manner.” *Aids*
10 *Healthcare Foundation v. Los Angeles County Department of Public Health*, 197
11 Cal.App.4th 693, 700-701 (2011) (holding that specifically requiring the department
12 to take certain steps violated the discretion vested in it and, thus, was not appropriate
13 for a writ of mandate). Mandamus will not lie to “compel the exercise of [the
14 Commissioner’s] discretion in a particular manner or to reach a particular result.”
15 *Daily Journal Corp. v. Cnty. of L.A.*, 172 Cal.App.4th 1550, 1555 (2009). Rather,
16 “Code of Civil Procedure section 1085 may only be employed to compel the
17 performance of a duty which is purely ministerial in character. A ministerial act is
18 an act that a public officer is required to perform in a prescribed manner in
19 obedience to the mandate of legal authority and without regard to his own judgment
20 or opinion concerning such act's propriety or impropriety, when a given state of
21 facts exists. Discretion, on the other hand, is the power conferred on public
22 functionaries to act officially according to the dictates of their own judgment.”
23 *Rodriguez v. Solis*, 1 Cal.App.4th 495, 501–50 (1991). Further, the trial court may
24 not substitute its judgment for that of the agency or force the agency to exercise its
25 discretion in a certain way. *Cal. Ass’n of Med Prods. Suppliers v. Maxwell-Jolly*,
26 199 Cal.App.4th 286, 303 (2011).

27 18. The CSA provided that the Commissioner would monitor Removing
28 Defendants’ compliance with the CSA at the Commissioner’s own discretion:

1 “[t]he Insurance Commissioner shall conduct examinations of the Claim
 2 Reassessment Unit’s claim decisions and compliance with the other terms of the
 3 CSA, including changes made in claims handling practices and procedures
 4 contemplated by the CSA, **all in the manner and at such intervals as he or she**
 5 **deems appropriate in accordance with the Insurance Code and Regulations.**”
 6 See Exhibit 2 to Plaintiff’s Complaint at p. 10 (emphasis added).

7 19. Here, through her fourth cause of action, Plaintiff improperly seeks to
 8 dictate the manner in which the Commissioner exercises his discretion with respect
 9 to monitoring Removing Defendants’ compliance with the CSA. It is well
 10 established that Plaintiff cannot seek a writ of mandamus to compel the
 11 Commissioner to exercise its discretion under the CSA in any particular manner.
 12 *Schwartz v. Poizner*, 187 Cal.App.4th 592, 597 (2010); *Daily Journal*, *supra*, 172
 13 Cal.App.4th at 1555. Accordingly, Plaintiff’s writ of mandamus cause of action
 14 fails as a matter of law, and the Commissioner must be deemed a fraudulently joined
 15 defendant.

16 *The Commissioner has already exercised his discretionary power by*
 17 *monitoring Removing Defendants’ compliance with the CSA*

18 20. The crux of Plaintiff’s mandamus claim – that the Commissioner
 19 “failed to timely and comprehensively examine the Insurer Defendant’s compliance
 20 with the CSA” (Complaint, p. 18, ¶ 114) – is demonstrably false. In fact, the
 21 Commissioner has performed the task of “conduct[ing] examinations of the Claim
 22 Reassessment Unit’s claim decisions and compliance with the other terms of the
 23 CSA.” As stated in a March 28, 2008 Market Conduct Examination Report (the
 24 “Examination Report”), the California Department of Insurance (“CDI”) conducted
 25 an in-depth examination of Removing Defendants’ claims handling practices to
 26 monitor their compliance with the CSA. See the Examination Report attached as
 27 Ex. 1 to the accompanying Declaration of Susan Griffin. As explained in the
 28 Examination Report, “[t]he examination covered the claims handling practices of

1 the reassessment of claims arising out of the California Settlement Agreement
 2 (CSA) and claims subject to and closed after the California Settlement Agreement.”
 3 *Id.* at p. 2. The CDI's examination included “[a] linear review of the actions taken []
 4 to comply with the California Settlement Agreement.” *Id.* at p. 3. In carrying out
 5 the examination, the CDI reviewed 281 claims. *Id.* at p.2. **“The examination was
 6 made to discover, in general, if these and other operating procedures of
 7 [Removing Defendants] conform to the California Settlement Agreement . . .”**
 8 *Id.*

9 21. Significantly, **the CDI determined that Removing Defendants had**
 10 **complied with their obligations under the CSA: “[t]he CDI was not able to**
 11 **identify any alleged violations of the California Settlement Agreement or**
 12 **California Insurance Code Section 790.03.”** *Id.* at 3 (emphasis added).

13 22. Furthermore, the Examination Report confirmed that the Commissioner
 14 had a plan in place for continuing to monitor Removing Defendants' compliance
 15 with the CSA even after the completion of the examination. As stated in the
 16 Examination Report, **the Commissioner “continues to monitor [Removing**
 17 **Defendants’] compliance with the CSA via the CDI complaint process,”** and
 18 **“[i]n the event that any pattern or trend of non-compliance is identified,**
 19 **additional Market Conduct Examinations will be performed.”** *Id.* at p. 7.

20 23. The above facts establish that the Commissioner has in fact exercised
 21 his discretion and satisfied his obligations with respect to monitoring Removing
 22 Defendants’ compliance with the CSA through (1) the claim file examination
 23 reflected in the Examination Report, and (2) the CDI complaint process.
 24 Accordingly, Plaintiff has no basis to seek a writ of mandate against the
 25 Commissioner, and Plaintiff’s Fourth Cause of Action against the Commissioner
 26 fails as a matter of law.

Additional grounds for removal to this Court

24. Alternatively, the claims against the Removing Defendants should be severed and kept in federal court based on the doctrine of fraudulent misjoinder. *See Sutton v. Davol, Inc.*, 251 F.R.D. 500, 504 (E.D. Cal. 2008) (Fraudulent misjoinder typically occurs when a plaintiff sues a diverse defendant in state court and joins a non-diverse defendant against which the plaintiff has a reasonable basis for a claim, but that claim has little or nothing to do with the plaintiff's claim against the diverse defendant). Here, Plaintiff alleges that the Commissioner has failed to monitor Removing Defendants' compliance with the CSA under the terms of the CSA. However, the success or failure of Plaintiff's claim against the Removing Defendants is unrelated to her claim against the Commissioner, because a violation of the CSA is not a condition precedent to a breach of contract, bad faith or intentional infliction of emotional distress claim against the Removing Defendants. Rather, Plaintiff's claims for relief arise out of California statutes, regulations and case law independent of any alleged non-compliance with the CSA.

25. Additionally, plaintiffs' counsel in cases involving disability insurance disputes routinely join the Commissioner as a sham defendant to prevent insurers from removing based on diversity. California courts have repeatedly sustained the Commissioner's demurrers to nearly identical mandamus complaints without leave to amend. Undeterred, Plaintiff's counsel here has advanced a meritless claim against the Commissioner that, should the district court order a remand, will undoubtedly be dismissed with prejudice by the superior court on the Commissioner's demurrer. (*See* concurrently filed Request for Judicial Notice, Exhibits "A" through K".) That alone is an independent reason for this Court to find that Plaintiff has engaged in a fraudulent joinder. *See e.g. Time, Inc., supra*, 83 F.R.D. at 460; *Surles v. Prudential Ins. Co. of Am.*, 2007 WL 164548, *5 (N.D. Cal. Jan. 19, 2007) (awarding fees against firm for naming insurance commissioner as a defendant simply to destroy diversity jurisdiction).

26. Finally, Plaintiff's Fourth Cause of Action against the Commissioner fails because California Code of Civil Procedure Section 1086 requires that a petition for writ of mandate be issued upon a verified petition, and Plaintiff's complaint is unverified. *Krueger v. Superior Court*, 89 Cal. App. 3d 934, 939 (1979).

JOINDER IN REMOVAL

27. Because the Commissioner is a sham defendant, he is not required to join in this Notice of Removal. *Emerich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988).

WHEREFORE, Removing Defendants pray that the above-referenced action now pending in the San Francisco County Superior Court, State of California, Civil Division, Case No. CGC-14-540980, be removed from that court to this United States District Court.

DATED: July 31, 2015

HINSHAW & CULBERTSON LLP

By: /s/ James A. Hazlehurst

Robert E. Hess
James A. Hazlehurst
Attorneys for Defendants Unum Group
and Unum Life Insurance Company of
America

CERTIFICATE OF SERVICE

Mahoney v. Unum et al.

Case No. 3:15-cv-03532

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am a citizen of the United States and employed in Irvine, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of 18 and not a party to the within actions; my business address is 19800 MacArthur Boulevard, Irvine, CA 92612-2427.

On July 31, 2015, I served the document entitled, **NOTICE OF REMOVAL OF CIVIL ACTION**, on the interested parties in this action by placing true copies thereof enclosed in a sealed envelope addressed as stated below:

SEE ATTACHED SERVICE LIST

☒ **(BY MAIL):** I deposited such envelope in the mail at Irvine, California with postage fully prepaid. I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be placed for collection and mailing, and deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ **(VIA OVERNIGHT MAIL):** I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery. Under that practice it would be deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; otherwise at that party's place of residence.

☐ **(BY ELECTRONIC MAIL):** By transmitting a true copy thereof to the electronic mail addresses as indicated below.

☐ **(BY FACSIMILE):** By transmitting an accurate copy via facsimile to the person and telephone number as stated.

☐ **(BY CM/ECF SERVICE):** I caused such document(s) to be delivered electronically via CM/ECF as noted herein.

I declare under penalty of perjury under the laws of the United States that the above is true and correct and was executed on July 31, 2015 July 31, 2015, at Irvine, California.

Nancy C. Arnold

Nancy C. Arnold

SERVICE LIST
Mahoney v. Unum et al.

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